KRISHNAN KUPPANAN A

v.

KULDEEP SINGH HARI SINGH & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
LEE HENG CHEONG JC
[CIVIL SUIT NO: 22NCVC-209-02-2013]
10 JANUARY 2013

INSURANCE: *Insurance clause - Terms of - Professional indemnity insurance policy - First defendant insured by third defendant - Plaintiff's claim against first defendant for breach of duty - Failure to settle judgment sum - Whether insurance coverage extended to third parties - Whether coverage subject to terms and conditions of policy - Whether there was privity of contract between plaintiff and third defendant - Condition precedent - First defendant to give notice to third defendant about any claim made against him - Failure of - Whether condition precedent breached - Whether third defendant liable to provide indemnity* C D

CIVIL PROCEDURE: *Striking out - Application for - Rules of Court 2012, O. 18 r. 19(1)(b), (d) - Duplicity of issues - Subject matter in present suit tried and determined in earlier suit - Whether plaintiff sought to relitigate matters which had been decided - Whether claim time barred - Limitation Act 1953, s. 6(1) - Doctrine of res judicata - Whether applicable - Whether an abuse of process of court* E F

The first defendant had been insured by the third defendant under the Malaysian Bar Professional Indemnity Insurance Policy ('the PII policy'). The terms of the insurance and the coverage were duly contained in the PII policy which in turn consists of, *inter alia,* the certificate of insurance ('COI'). In the present suit, the plaintiff sought an indemnity from the third defendant. Initially, the plaintiff filed an action against the first defendant in the Shah Alam Sessions Court ('the Shah Alam suit') based on the latter's acts of fraud and/or breach of duty resulting in misconduct on the part of the first defendant. In the said suit, the plaintiff's application for a garnishee order against the third defendant was based on, *inter alia,* the following grounds, *ie,* (i) that the first defendant had failed and/or refused to pay the judgment sum to the plaintiff; and (ii) that the third defendant was under an obligation to pay an indemnity to the plaintiff. The Sessions Court, however, dismissed the application for the garnishee order and the plaintiff's appeal to the High Court was dismissed. The plaintiff G H I

was then granted leave by the Court of Appeal to appeal against the decision of the High Court. However, the plaintiff failed to file the record of appeal within the prescribed time and as a result, his appeal was struck out by the Court of Appeal. In the present suit, the third defendant filed an application pursuant to O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 to strike out the plaintiff's claim by asserting that the plaintiff attempted to relitigate upon issues that were heard and disposed of in the Shah Alam suit. Hence, the issues that arose for consideration, *inter alia,* were (i) whether the plaintiff was precluded, prohibited and/or estopped from instituting the present claim by reason of the doctrine of *res judicata;* (ii) whether the plaintiff's claim was time barred; (iii) whether there was privity of contract between the plaintiff and the third defendant; and (iv) whether the third defendant was liable to provide any indemnity under the PII policy.

Held (allowing third defendant's application):

(1) There was duplicity of issues wherein the plaintiff sought to re-litigate the subject matter and/or issues which had been tried and determined in the Shah Alam suit. By filing the present suit, the plaintiff wanted to seek a different outcome from that which he had obtained in the Shah Alam suit. Thus, the plaintiff's action herein was an abuse of court process as he had the opportunity to set aside the High Court's decision in the Shah Alam suit. However, the plaintiff lost the opportunity to prosecute his appeal to the Court of Appeal by failing to file the requisite record of appeal within the prescribed time period, resulting in it being struck out by the Court of Appeal. Thus, the plaintiff was, in law and/or in equity, estopped from instituting the present claim by reason of the operation of the doctrine of cause of action estoppel and/or issue estoppel and/or by reason of the doctrine of *res judicata.* (paras 13 - 15)

(2) The plaintiff's cause of action accrued on 21 June 2006 being the date of the letter in which the third defendant denied liability. More than six years had elapsed since the issuance of the said letter and the filing of the present suit. Hence, the present action was time barred in view of the fact that the limitation period in which the present claim could be initiated had set in pursuant to s. 6(1) of the Limitation Act 1953. (paras 18 & 19)

(3) The plaintiff was not a party to the PII policy which was issued for the sole purpose of providing insurance coverage to the first defendant and such coverage was subject to the terms and conditions contained in the PII policy. The insurance coverage did not in fact and/or in law extend to third parties such as the plaintiff herein. Thus, there was no privity of contact between the plaintiff and the third defendant (*Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors*; refd). (paras 20 & 21)

(4) It was a condition precedent under the PII policy that the first defendant shall give notice to the third defendant of any claim made against him during the period of insurance as stipulated in the PII policy. The first defendant did not comply with the PII policy and had breached the condition precedent under the said policy. As such, the third defendant's liability to make payment under the PII policy was not triggered. The first defendant's compliance with the terms of the PII policy was a condition precedent for any such liability to arise. (paras 23 & 24)

(5) The plaintiff's claim against the first defendant was wholly grounded on his acts of fraud and/or breach of duty whereby the said acts constitutes misconduct on the part of the first defendant. This was not covered by the terms of the COI which precluded the third defendant from indemnifying the first defendant for any damages that the first defendant was obliged to pay as a result of his own misconduct. (para 25)

(6) The plaintiff's claim against the third defendant was obviously unsustainable and unmaintainable against the third defendant. Alternatively, the plaintiff's claim was scandalous, frivolous and vexatious and/or was tantamount to an abuse of the court's process. (para 26)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [2011] 1 LNS 440 CA ***(refd)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd [1975] 1 LNS 14 HC ***(refd)***

Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***
Nittan (UK) Ltd v. Solent Steel Fabrication Ltd [1981] 1 Lloyd's Rep 633 ***(refd)***
Teck Liong (EM) Sdn Bhd v. Hong Leong Assurance Sdn Bhd [2001] 7 CLJ 457 HC ***(refd)***

Legislation referred to:
Insurance Act 1996, ss. 186(3), (4)
Limitation Act 1953, s. 6(1)
Rules of Court 2012, O. 18 r. 19 (1)(b), (d)

For the plaintiff - Sutharsanan Shanmugan; M/s Sutha & Co
For the 2nd defendants - Jamie Wong Siew Min (Yeoh Cho Kheng with her); M/s Ranjit Singh & Yeoh
For the 3rd defendants - Natalia Izra Nasaruddin; M/s Zul Rafique & Partners

Reported by Kumitha Abd Majid

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This grounds of decision relates to the third defendant's application for an order that the plaintiff's claim herein be struck out with costs (encl. 16).

[2] There are two other suits initiated against the second and third defendants herein whereby the causes of action are almost identical to that pleaded in this suit. These suits are tried in the same court as this matter and the solicitors representing the plaintiffs in the other suits are the same solicitors representing the plaintiff in this action. The particulars of the two other suits are as follows:

(i) In the High Court of Malaya in Kuala Lumpur

Civil Suit No: 22 NCVC-210-02/TAHUN 2013

Between

Gopalariashnan a/l Kathervaloo … Plaintiff

And

(1) Kuldeep Singh a/l Hari Singh,
sole proprietor of the firm,
Messrs Hassan Kuldeep & Co ... 1st Defendant

(2) Malaysian Bar Council ... 2nd Defendant

(3) Tune Insurance Malaysia Berhad ... 3rd Defendant

(hereinafter referred to as "the Gopalariashnan suit")

(ii) In the High Court of Malaya in Kuala Lumpur

Civil Suit No: 22 NCVC-211-02/TAHUN 2013

Between

Rasalingam a/l Arumugam ... Plaintiff

And

(1) Kuldeep Singh a/l Hari Singh,
sole proprietor of the firm
Messrs Hassan Kuldeep & Co ... 1st Defendant

(2) Malaysian Bar Council ... 2nd Defendant

(3) Tune Insurance Malaysia Berhad ... 3rd Defendant

(hereinafter referred to as "the Rasalingam suit")

[3] In addition to filing the striking out application in this suit, the third defendant had also filed the requisite applications to strike out the Gopalariashnan suit and the Rasalingam suit. The grounds forming the premise of the applications to strike out in those actions are identical to that in this suit. The third defendant's applications to strike out the Gopalariashnan suit and the Rasalingam suit are marked respectively as encl. 18 and encl. 17.

[4] During the case management held on 5 June 2013 for this action as well as the Gopalariashnan suit and the Rasalingam suit, the plaintiffs' counsel proposed that the striking out applications made by the third defendant in all three actions be heard together as the issues raised therein are identical. This court with the consent of all parties directed that the court's decision in respect of this striking out application filed herein will also apply to the two other suits.

A **The Third Defendant's Grounds For Striking Out**

[5] The third defendant contends as follows:

(a) that the plaintiff's present claim is an attempt to re-litigate upon issues that have already been heard and disposed of in a prior suit in the Sessions Court in Shah Alam, Selangor *vide* Sessions Court Summons No: S2-52-4093-2003 ('the Shah Alam suit'), which was filed by the plaintiff against the first defendant and wherein the third defendant herein was named as the garnishee in the Shah Alam suit. Thus the plaintiff is in law and/or in equity precluded, prohibited and/or estopped from instituting the present claim by reason of the operation of the doctrine of cause of action estoppel and/or issue estoppel and/or by reason of the doctrine of *res judicata*.

(b) The present claim is time-barred by operation of statute.

(c) There is no privity of contract as between the plaintiff and the third defendant.

(d) The liability on the part of the third defendant to provide an indemnity to the first defendant under the professional indemnity insurance policy ("PII policy"), had not been triggered.

Chronology Of Events (The Shah Alam Suit)

[6] By way of background, plaintiff had earlier filed the Shah Alam suit where the plaintiff therein, is the same plaintiff in this suit, whilst the first defendant therein is the first defendant named in the present suit. The third defendant in this suit was the garnishee in the Shah Alam suit. Having perused and considered the third defendant's chronology of events in respect of the Shah Alam suit, this court accepts and adopts the pertinent portions of the third defendant's said version of the chronology of events.

Date	Event
8th June 2004	By way of an amended summons and amended statement of claim, the plaintiff herein had previously initiated a suit bearing the summons number S2-52-4093-2003 in the Sessions Court in Shah Alam as against the first defendant herein ("the Shah Alam Suit"). The counsel acting for the plaintiff in the Shah Alam Suit is the same counsel acting for the plaintiff herein.

13th January 2005	When the Shah Alam Suit was called up in court for mention, the first defendant was not present in court on that day which in turn led the Sessions Court, to enter a Judgment in Default of Appearance against the first defendant ("the Judgment in Default"). As a result, the first defendant was ordered to pay to the plaintiff (who became the Judgment Creditor in the Shah Alam Suit upon the entry of the said Judgment in Default), the following amounts as prayed for in the statement of claim ("the Judgment Sum"): (a) A sum of RM220,000; and (b) Interest at a rate of 8% on RM220,000 from 1 March 2003 until the date of full and final settlement.
18th January 2006	The plaintiff then filed a notice of application (*ex-parte*) wherein the plaintiff applied to the Sessions Court for an order that the Judgment Sum be paid by the third defendant herein (who was named as the Garnishee in the Shah Alam Suit) to the plaintiff ("the application for Garnishee Order"). The application for Garnishee Order was based on *inter alia* the following grounds: (a) The first defendant had failed and/or refused to pay the Judgment Sum to the plaintiff; and (b) The first defendant had taken out a Professional Indemnity Insurance Policy ("the PII Policy") with the third defendant and pursuant thereto, the third defendant is purportedly under an obligation to pay an indemnity to the plaintiff as a result of the misappropriation of the Judgment Sum by the first defendant as the said Judgment Sum was paid by the plaintiff to the first defendant in connection to a sale and purchase transaction in which the first defendant was acting as the plaintiff's solicitor.

15th June 2007	The Sessions Court dismissed the application for Garnishee Order ("Order of the Sessions Court").
19th June 2007	The plaintiff filed a Notice of Appeal against the order of the Sessions Court as stated above.
10th February 2010	The High Court dismissed the appeal against the order of the Sessions Court Judge. During the hearing of the appeal before the High Court, the respective counsel submitted upon the merits of the plaintiff's claim against the third defendant (who as stated above was the garnishee in the Shah Alam Suit). (a) Amongst the issues submitted upon before the High Court, is the applicability of ss. 186(3) and 186(4) of the Insurance Act 1996 as the premise upon which the third defendant is purportedly indebted to the plaintiff (which in any event is denied). (b) In dismissing the appeal against the order of the Sessions Court, the High Court *inter alia* held that the third defendant was not indebted to the first defendant, whereby such indebtedness is a pre-requisite to the final garnishee order being made in favour of the plaintiff. The determination was made on the following grounds: (i) The first defendant (as the Judgment Debtor in the Shah Alam Suit) had breached a condition precedent in the PII Policy which he held with the third defendant (as the Garnishee in the Shah Alam Suit) in failing to notify the third defendant of the claim made against him by the plaintiff (as the Judgment Creditor in the Shah Alam Suit). (ii) At all material times, the third defendant (as the Garnishee in the Shah Alam Suit) had denied and/or refuted that it was indebted to either

	the first defendant (as the Judgment Debtor in the Shah Alam Suit) and/ or plaintiff (as the Judgment Creditor in the Shah Alam Suit).
19th May 2011	Although the plaintiff was granted leave by the Court of Appeal to appeal against the decision of the High Court, the plaintiff failed to file the Record of Appeal within the prescribed time. The plaintiff's application for an extension of time to file the Record of Appeal was dismissed by the Court of Appeal. The appeal was also struck out by the Court of Appeal.

[7] This court notes that the chronology of events set out above is similar to that of the events which transpired in the Sessions Court and High Court in Shah Alam for the Gopalariashnan suit. The High Court in Shah Alam, heard the appeals lodged by the plaintiff in this suit as well as the Gopalariashnan suit against the orders of the Sessions Court Judge, to dismiss the aforementioned garnishee applications together.

[8] The events which transpired in the Sessions Court and High Court in Shah Alam in respect of the Rasalingam suit differ in the following manner:

(a) On 26 June 2009, the Sessions Court allowed the application for garnishee order (order of the Sessions Court"). The third defendant subsequently filed a notice of appeal dated 8 July 2009 against the order of the Sessions Court as stated above.

(b) On 26 March 2010, the High Court allowed the appeal against the order of the Sessions Court Judge.

(i) During the hearing of the appeal before the High Court, the respective counsel submitted upon the merits of the plaintiff's claim against the third defendant (who as stated above was the garnishee in the Shah Alam suit).

(ii) Amongst the issues submitted upon before the High Court, is the applicability of ss. 186(3) and 186(4) of the Insurance Act 1996 as the basis upon which the third defendant is purportedly indebted to the plaintiff.

(c) In allowing the appeal against the order of the Sessions Court Judge, the High Court *inter alia* held (as stated in the grounds of judgment) that the third defendant was not indebted to the first defendant, whereby such indebtedness is a pre-requisite to the final garnishee order being made. It was found that as the first defendant (who was the judgment debtor in the Shah Alam suit) had committed an act of fraud and/or wrongdoing, which such act and/or wrongdoing formed the basis of the first defendant's liability to the plaintiff, the first defendant should not and/or cannot be indemnified under the PII policy which he had held with the third defendant.

(d) The plaintiff was granted leave by the Court of Appeal to appeal against the decision of the High Court as stated above. However, the plaintiff had failed to file the record of appeal in the Court of Appeal within the time stipulated and then had to file an application for an extension of time to file the said record of appeal.

(e) The plaintiff's application for an extension of time to file the record of appeal was dismissed by the Court of Appeal on 23 March 2011. The plaintiff's appeal was subsequently struck out by the Court of Appeal on 14 October 2011.

The Relevant Provisions And Principles In Law Regarding Striking Out Applications

[9] The present application to strike out is *inter alia* made pursuant to O. 18 r. 19 (1)(b) and/or (d) of the Rules of Court 2012 which states as follows:

> Striking out pleadings and indorsements (O. 18 r. 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> …
>
> (b) it is scandalous, frivolous or vexatious; or
>
> …
>
> (c) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[10] In the case *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, it was *inter alia* held on p. 11 (CLJ); p. 37 (MLJ) therein that: A

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. B C

Consideration Of The Third Defendant's Application To Strike Out

Whether The Plaintiff's Claim Herein Is Res Judicata/Issue Estoppel? D

[11] This court finds that after perusing the amended statement of claim filed by the plaintiff in the Shah Alam suit against the first defendant, it clearly reveals that the basis of the claim in the Shah Alam suit is identical to the plaintiff's claim herein ie, purported misappropriation of the monies belonging to the plaintiff by the first defendant. E

[12] This court further notes that the plaintiff in his statement of claim and affidavit in reply herein, merely sought to impugn the judgments of the High Court in Shah Alam by stating that the judge had not considered the provisions contained in ss. 186(3) and 186(4) of the Insurance Act 1996, which purportedly forms the basis of the third defendant's duty to indemnify the plaintiff for his loss. A perusal of the affidavit in support for the application for garnishee order in the Shah Alam suit reveals that the grounds therein are identical to that pleaded in this suit against the third defendant. The reliefs sought in the said application for garnishee order are also the same as that in the present suit which in essence, is for an order that the third defendant pay the judgment sum (pursuant to the judgment in default obtained in the Sessions Court in Shah Alam) to the plaintiff. F G H

[13] This court finds that by filing the present suit, the plaintiff clearly sought to seek a different outcome from that which he obtained in the Shah Alam suit. Thus the plaintiff's present action is an abuse of process as the plaintiff had the opportunity to set I

A aside the Shah Alam High Court's decision in the Shah Alam suit (to disallow the garnishee order from being entered) as he was granted leave by the Court of Appeal, to file his notice of appeal thereto (as did the plaintiffs in the Gopalariashnan suit and the Rasalingam suit). However the plaintiff lost the opportunity
B prosecute his appeal to the Court of Appeal, by failing to file the requisite record of appeal within the prescribed time period and as a result, his appeal was thus struck out by the Court of Appeal. This was also the same outcome in the Gopalariashnan suit and the Rasalingam suit. The plaintiffs in all three suits were
C represented by the same counsel.

[14] Thus this court finds that there is duplicity of issues wherein the plaintiff in filing the present suit, sought to raise and re-litigate upon the subject matter and/or issues which have been tried and
D determined in the Shah Alam suit. This court is guided by the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 where the court *inter alia* held as follows:

E (1) *When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata*, as the judgment becomes the truth between such parties. As estoppel *per rem judicatum* has been created as a result.

F (2) There are two kinds of estoppel *per rem judicatum*, ie cause of action estoppel and issue estoppel. *The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties.* On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a
G subsequent proceeding. *Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.*

H (3) Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata*, which is an estoppel based on public policy, even if it has not been pleaded as public policy requires that there should be finality in litigation.

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(4) The borrower's case was a classical case for the application of the doctrine of *res judicata* by way of a cause of action estoppel. The causes of action of both the first proceeding and the present statement of claim were identical … All rights and liabilities of both parties had merged into the judgment of the first proceeding and the effect of a cause of action estoppel was absolute. (emphasis added)

[15] Thus this court finds that the plaintiff is in law and/or in equity, estopped from instituting the present claim by reason of the operation of the doctrine of cause of action estoppel and/or issue estoppel and/or by reason of the doctrine of *res judicata*.

Whether The Plaintiff's Claim Is Time Barred?

[16] In para. 5 of his statement of claim, the plaintiff had pleaded as follows: "Pada 13 haribulan Januari 2005 plaintif telah memasuki penghakiman ingkar terhadap defendan pertama dibawah tindakan Mahkamah Sesyen Shah Alam Saman No. S2-52-4093-2003 untuk wang sebanyak RM220,000 sahaja bersama faedah pada kadar 8% setahun ke atas RM150,000 sahaja **dari 1 Mac 2003 sehingga tarikh penyelesaian penuh** …" (emphasis added).

[17] In the present case, the plaintiff is seeking an indemnity from the third defendant on the basis that the first defendant had been insured by the third defendant under a Malaysian Bar Professional Indemnity Insurance Master Policy No. D02BRAPRF000001R ("the PII policy") from 1 January 2003 until 31 December 2003. The terms of insurance and the insurance coverage are duly contained in the PII policy, which in turn consists of the master policy, the certificate of insurance ("COI") and the schedule attached thereto.

[18] On 7 April 2006, the plaintiff's solicitors issued a letter to the third defendant in which a claim was made to the third defendant, to pay to the plaintiff, the judgment sum on the basis that the first defendant was insured under the PII policy. On 21 June 2006, the third defendant in a letter to the plaintiff's solicitors, denied liability. Thus the plaintiff's cause of action accrued on 21 June 2006, being the date of the letter in which the third defendant had denied liability and more than six years had elapsed since the issuance of this said letter and the filing of the present suit.

[19] Thus this court finds that the present action is time barred in view of the fact that the limitation period in which the present claim can be initiated by the plaintiff as against the third defendant, has set in pursuant to and/or by virtue of s. 6(1) of the Limitation Act 1953 which provides as follows:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –
>
> (a) actions founded on a contract or tort …

Whether There Is Any Privity Of Contract?

[20] This court finds that it is apparent that the plaintiff is not a party to the PII policy which is issued for the sole purpose of providing insurance coverage to the first defendant and such insurance coverage is subject to the terms and conditions contained in the PII policy. The insurance coverage provided under the PII policy does not and cannot in fact and/or in law extend to third parties such as the plaintiff herein.

[21] Thus this court finds that there is no privity of contract as between the plaintiff and the third defendant and is guided by the case of *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [2011] 1 LNS 440; [2011] 5 MLJ 820 where the Court of Appeal *inter alia* held as follows:

> As said by Lord Reid in *Scruttons Ltd v. Midland Silicones Ltd* it is the general rule that 'a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision it was intended to benefit him'.
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> …
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> This would of course be in line with the doctrine of privity. The doctrine is clear. A non-party cannot bring an action on the contract. **A person not a party to a contract cannot enforce or rely for protection on its provisions**. The rule of privity relates to who can enforce the contract. (emphasis added)

Whether The Liability To Indemnify Is Triggered?

[22] This court agrees with the contention of the third defendant that in any event, there is no liability to provide any indemnity under the PII policy as the first defendant had failed to comply with and/or has breached express terms that are contained in the

COI which expressly states that due observance and fulfilment of the said terms, shall be conditions precedent to any liability of the third defendant to make any payment under the PII policy.

[23] It is a condition precedent under the PII policy that the first defendant shall give notice to the third defendant of any claim made against him during the period of insurance as stipulated in the PII policy. This is laid down the following clauses in the PII policy:

> Clause 5.1
>
> *The due observance and fulfilment of the terms conditions and endorsements of this policy insofar as they relate to anything to be done or complied with by the Insured (the 1st Defendant) and the truth of the statements and answers in the proposal form shall be conditions precedent to any liability of the Insurers to make any payments under this policy.*
>
> Clause 5.2.1
>
> *The Practice shall ensure that notice is given as soon as practicable to any claim made against the Insured during the Period of Insurance* which may form the subject of indemnity under this Insurance or of the receipt of any intimation of an intention to make a claim against the Insured.
>
> Clause 5.2.2
>
> Notice shall also be given of any matter event or circumstance of which the Insured shall become aware during the Period of Insurance and which may reasonably be expected to give rise to a claim against the Insured.
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> Clause 5.3
>
> Unless otherwise notified by the Insurers notice in terms of General Condition 5.2 shall be given in writing or by tested facsimile … (emphasis added)

[24] Having perused the above clauses, this court finds that it is clear that the first defendant did not comply with the above said clauses and the first defendant's omission as stated above, is a clear breach of a condition precedent under the said PII policy. As such, the third defendant's liability to make payment under the PII policy, is not triggered as it is expressly stated in cl. 5.1 above

A that compliance with the terms of the PII policy by the first defendant is a condition precedent for any such liability to arise. This court is guided by the following cases:

(a) *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd* [1975] 1 LNS 14; [1977] 1 MLJ 244 wherein the court had *inter alia* held as follows:

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> The obligation of the part of the appellant to give notice of the accident and to deliver the notice in writing to the respondents could become liable under the policy for it is expressly stated in the policy that the due observance and fulfilment of the terms of the policy insofar as they relate to anything to be done by the appellant shall be conditions precedent to any liability of the respondents to make any payment under the policy.

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(b) *Teck Liong (EM) Sdn Bhd v. Hong Leong Assurance Sdn Bhd* [2001] 7 CLJ 457 where the court *inter alia* held as follows:

> When a term in a contract of insurance is stipulated to be a condition precedent to a liability of an insurer, that condition has to be strictly complied with by an insured before the insured is entitled to claim in the policy.

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[25] Further, this court finds that since the plaintiff's claim against the first defendant is wholly grounded on his acts of fraud and/or breach of duty which acts of fraud and/or breach of duty clearly

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constitute misconduct on the part of the first defendant, which are not covered by the terms of the COI and in particular cl. 6.5 which expressly precludes the third defendant from indemnifying the first defendant for any damages that the first defendant is obliged to pay as a result of his own misconduct. This court is

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guided by the following judicial cases:

(a) *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 2 MLJ 256, where the Court of Appeal *inter alia* held that:

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> That to deny the legitimacy and effectiveness of an exclusion clause for which it was designed, would render it meaningless. The exclusion clause was clear and the words were easily definable, with no absurdity, inconsistency or repugnancy when arriving at a straightforward interpretation.

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(b) *Nittan (UK) Ltd v. Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633 where Lord Denning MR had held that:

> Looking at the whole of the case, it seems to me that this exclusion was put in by the insurers because they knew that product liability can result in enormous claims. Fearing this … they only accepted it on the basis – not only of their standard form – but of the special exclusion brought in by the letter of March 25. It seems to me that that exclusion is wide enough in its terms to cover the incident which happened here …

Order

[26] In light of the court's above findings, this court finds that the plaintiff's claim against the third defendant is obviously unsustainable and unmaintainable as against the third defendant. Alternatively, this court also finds the plaintiff's claim is scandalous, frivolous and vexatious and/or tantamount to an abuse of the court's process.